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June 6, 2011

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: Finance Docket No. 35517, CF Industries, Request for Declaratory Order

Dear Ms. Brown:

Pursuant to 49 C.F.R. §§1104.3 and 1117.1, Edison Electric Institute ("EEI") hereby requests leave of the Board to submit this *amicus* letter in response to the Petition filed on behalf of Petitioner CF Industries, Inc. in the above-referenced proceeding ("Petition"), with respect to an important legal issue raised by the Petition. This legal issue is of great concern to EEI and its members, because it first arose and was decided by the U.S. Court of Appeals for the D.C. Circuit in litigation brought decades ago by certain EEI members, has arisen more recently in other proceedings before the Board, and for various reasons appears likely to continue to be raised because of its importance (and perhaps because it has been dealt with inconsistently by the Board) until it is clearly resolved by the Board.

EEI requested the consent of the Petitioner CF Industries and of the three Railroads Respondents named in the Petition to file this *amicus* letter. CF Industries consented, but the three Railroad Respondents did not consent. In any event, EEI hereby requests leave of the Board to file this *amicus* letter.

Legal Issue

The legal issue that is of great concern to EEI and its members is whether the shippers, or the railroads, bear the burden of proof if railroads seek to impose more stringent safety-related measures than are required by the DOT (which has primary safety-related jurisdiction over the railroads) and other federal agencies which may be involved, depending on the circumstances, and those measures are challenged before the Board.

Petitioner CF Industries frames the problem well in the Petition (at 5):

> "The D.C. Circuit has held that there is a presumption that safety measures in excess of those imposed by regulatory agencies charged with primary

responsibility for safety are unnecessary. [*Citing Consolidated Rail Corp. v. ICC,* 646 F.2d 642, 650-52 (D.C. Cir.) ("*Conrail*"), *cert. denied,* 454 U.S. 1047 (1981)].

"As the Board has acknowledged, 'primary jurisdiction, expertise and oversight responsibility in rail safety matters are vested in the Secretary of the Department of Transportation, and delegated to the Administrator of the Federal Railroad Administration (FRA) . . . [r]ail safety matters are, thus, primarily a matter for FRA's oversight in the first instance.' [*Citing Granite State Concrete Co., and Milford-Bennington R.R. Co., v Boston and Me. Corp. and Springfield Terminal Ry Co.*, STB No. 42083, 2003 WL 22121645, at n.5 (Sept. 12, 2003), *aff'd sub nom. Granite States Concrete Co. v. STB,* 417 F.3d 85 (1st Cir. 2005)]. There is a strong presumption that safety measures stricter than those imposed by the FRA, including special train service, are unnecessary. [*Citing Conrail,* 646 F.2d at 650-51]."

EEI seeks to be heard not only to support CF Industries' above-quoted argument, but also to urge the Board to follow the holding in *Conrail* (*id.* at 650-51) that the presumption that additional alleged safety-enhancing requirements are unnecessary can only be overcome by the railroad(s), not the shipper, proving that (a) the additional measure(s) would, indeed, enhance safety and, if so, whether (b) the benefits would exceed the costs of compliance with that measure and the additional measure is more "economical" than other measures to accomplish the same outcome.

Interest of EEI

EEI is the association of U.S. shareholder-owned electric companies. EEI's members serve 95 percent of the ultimate customers in the shareholder-owned segment of the industry, and they represent approximately 70 percent of U.S. electric power industry. EEI's diverse membership includes utilities operating in all regions, including in regions with Regional Transmission Organizations and Independent System Operators ("RTO/ISOs"), and companies supplying electricity at whole in all regions.

Some EEI members use anhydrous ammonia for pollution-control purposes at coal-fired power plants, and use railroads to transport it in many instances. Also, some EEI members use chlorine at nuclear plants, and some of that chlorine has moved by rail. Several of EEI's members were the Complainants/Petitioners in various proceedings before the Board's predecessor, the Interstate Commerce Commission ("ICC") in the 1970s and 1980s, involving the issues whether the railroads (a) were obliged to carry hazardous materials, (b) whether, if they were required to carry those materials, whether they may impose additional requirements, allegedly to enhance safety, that were not required by the U.S. Department of Transportation ("DOT") or other involved agencies (there, the U.S. Nuclear Regulatory Commission)("NRC"), and (c) whether the rates that the railroads sought to impose on the transportation of radioactive materials were reasonable. EEI's members prevailed on all of those issues before the ICC, but when a statute (the Nuclear Waste Policy Act) was enacted in 1982 providing that the responsibility for transportation of spent nuclear fuel and high-level radioactive waste

became that of the U.S. Department of Energy, the DC Circuit held that private parties such as EEI's members lacked standing to pursue litigation against the railroads over those rates because DOE, not the utilities, had the responsibility to take title to, and ship, the materials. *Union Pacific R.R. v. ICC*, 867 F.2d 646 (D.C. Cir. 1989).[1]

Legal Argument

In *Conrail, aff'g Trainload Rates on Radioactive Materials, Eastern Railroads*, 362 I.C.C. 756 (1980)(*"Trainload Rates"*), the DC Circuit held that the ICC did not have the authority to promulgate safety-related regulations for the transportation of hazardous materials, because that authority had been transferred to DOT when Congress created DOT. 646 F.2d at 648. The Court further held that the ICC should, in general, defer to the comprehensive safety regulations of the DOT (and, in that case, to those of the NRC, because radioactive materials were involved). *Id.* at 650. Relying on *Delta Air Lines, Inc. v. CAB*, 543 F.2d 247 (D.C. Cir. 1976), the Court went on to state that "perhaps" the ICC (now the STB) has "residual" authority to permit a railroad to go beyond the safety-related regulations of DOT and the other involved federal agencies, but that, in general, the ICC should defer to those other agencies with statutory safety-related authority as to what may be required for the transportation of hazardous materials. *Id.* at 651. The DC Circuit further stated that, if the ICC were to permit a railroad to attempt to impose additional safety-related requirements on the transportation of hazardous materials beyond the requirements of those other agencies, the railroad bore the burden of proof, in light of the allocation of safety-related authority described above and in the Court's opinion. *Id.* at 650, 656.[2] The Court explained that the railroad, in order to carry its burden of proof, had to show two things: "The safety measures for which expenditures are made must be reasonable ones, which means first, that they produce an expected safety benefit commensurate to their cost; and second, that when compared with other possible safety measures, they represent an economical means of achieving the expected safety benefit." *Id.* at 648.

In CF Industries' Petition (at 2), CF Industries states that the movements involved in NOR 35517 are of anhydrous ammonia to agricultural shippers, but that RailAmerica intends to apply its new tariffs to all movements of TIH-PIH materials on any Rail

[1] Accordingly, EEI's members were no longer involved in those proceedings on remand to the ICC from the DC Circuit. Those remanded proceedings continue to this day before the STB in Docket Nos. NOR 38302 and 38376.

[2] "The railroads may indeed seek to prove the reasonableness of additional safety measures, but the burden is on them to show that, for some reason, the presumptively valid DOT/NRC regulations are unsatisfactory or inadequate in their particular circumstance." 646 F.2d at 650. "In judging the reasonableness of the tariffs in this case, the ICC was entitled to assume that heavy additional expenditures by the railroads, allegedly for 'safety' but mandated neither by DOT or NRC, were presumptively unnecessary and hence unreasonable. Since the railroads failed to present evidence sufficient to rebut the presumption, we believe that Commission acted properly in finding on this record that [special train service] was unnecessary as a safety measure, and that the tariffs based on it were there therefore unreasonable." *Id.* at 656.

America-owned railroad. RailAmerica informed CF Industries by email that "By email dated April 19, 2011, RailAmerica informed CF that pursuant to new procedures RailAmerica (not any specific RailAmerica short-line) handles "TIH/PIH in dedicated train service at reduced speeds, so the dynamics are different than regular manifest train service." Petition at 2. In other words, Rail America intends that each of its railroads (of which there are 40) impose special train service and reduced speed limits on shipments of anhydrous ammonia and other TIH/PIH materials.

This action by the three RailAmerica railroads named in the Petition in essence repeats the history that led to the litigation involving radioactive materials. In the interests of preserving the Board's scarce resources, and so that shippers of whatever hazardous material are not constantly confronted by railroad attempts to get out from under the holding in *Conrail*, the Board should not permit this legal issue to be constantly re-litigated, but must instead follow the *Conrail* holding.

In *Trainload Rates*, the ICC struck down the attempt by the Eastern Railroads impose special train service on shippers of radioactive materials as wasteful and unnecessary, and to make the shippers bear the costs of that service. The ICC did so because it found that special train service (referred to there somewhat euphemistically as "trainload service" even though typically, each train would carry one cask car) did not enhance safety. The DC Circuit affirmed that finding in *Conrail*.

Based on the litigation involving radioactive materials, it seems doubtful that special train service is necessary for shipments of anhydrous ammonia, or that speed limits for such special trains should not exceed 10 miles per hour, because anhydrous ammonia has been, and is, transported safely every day in this country, in regular trains, and at normal train speeds. However, under *Conrail*, EEI also believes that the three Railroads have the right to attempt to prove that special trains and a 10-mph speed limit are appropriate in particular circumstances.

However, what the Board should not permit is for railroads to argue that the shipper bears the burden of proving that such requirements as special train service and a 10-mph speed limit would not make the transportation safer. Instead, under the holding in *Conrail*, that burden is to be borne by the railroads, and the Board is not free to depart from that holding.

Unfortunately, the Board has on occasion departed from that holding. Most recently, it did so in its decision in the "coal dust" proceeding, STB Finance Docket No. 35305, *Arkansas Electric Coop. Corp. – Petition for a Declaratory Order* (served March 5, 2011), slip op. at 5.[3] However, the Board's reasoning there for not following the

[3] EEI was a party in the "coal dust" proceeding, FD 35305, but because the Board's ultimate decision (March 3, 2011 slip op. at 11-14) adopted the position EEI took on the merits, and was not the result of the Board's erroneous reading of *Conrail* that the shippers, not the railroads, bore the burden of proof, EEI could not seek reconsideration of the Board's "coal dust" decision so as to take issue with its reading of *Conrail*.

holding in *Conrail* was that "[T]he Conrail decision was premised on facts not present here and on a statutory scheme predating the Staggers Act...." *Id.* Here, however, essentially the same facts are present: the railroads involved claim safety risks associated with transporting hazardous materials (here, anhydrous ammonia) justifying "special train service," just as in *Conrail.* And, with all due respect to the Board, while the holding in *Conrail* was indeed premised "on a statutory scheme predating the Staggers Act," that statutory scheme was not changed by the Staggers Act.[4] Rather, it was premised on the allocation of statutory safety authority to DOT (and other federal agencies, such as the NRC if radioactive materials are involved), not the STB, which remains essentially the same today:

> "Where DOT and NRC, pursuant to specific statutory authority, have established 'complete and comprehensive' safety standards in this particular area, Memorandum of Understanding, *supra,* and have drafted regulations in accord with the 'best-known practicable means for securing safety,' 18 U.S.C. § 834(c), while balancing the cost of safety with the need for economy, a presumption arises that expenditures for safety measures not specified by these agencies are unnecessary and fail to satisfy the criteria of reasonableness outlined above, *supra*·

[4] In the "coal dust" proceeding, the Board held (March 3, 2011 slip op. at 5) that it has "broad discretion to conduct case-by-case fact-specific inquiries to give meaning to the term statutory "reasonable," citing *Granite States Concrete Co. v. STB*, 417 F.3d 85, 92 (1st Cir. 2005) ("*Granite States*") and *WTL Rail Corp – Pet. For Dec. Order and Interim Relief,* STB Docket No. 42092, slip op. at 6 (served Feb. 17, 2006) ("*WTL Rail Corp.*"). EEI does not dispute that the Board has broad discretion to determine the facts in any proceeding before it, that does not mean it has the right to disregard the holding in *Conrail* as to which party bears the burden of proof as to whether additional safety-related requirements of a general nature are necessary where, as in *Conrail,* DOT has established a comprehensive scheme of regulation of transportation of goods by railroad, and has not imposed special train service or a 10-mph speed limit on shipments of hazardous materials such as anhydrous ammonia. As the DC Circuit noted in *Conrail,* the railroads are free to file a petition for rulemaking at DOT for a rule to have such general safety-related requirements imposed on shipments of anhydrous ammonia (or chlorine, or radioactive materials, or any other hazardous material), but to the best of our knowledge, they have not done so. Neither the First Circuit's decision in *Granite States* nor the Board's decision in *WTL Rail Corp.* cited the DC Circuit's decision in *Conrail,* so the Board cannot say that those decisions provide any basis for disregarding the holding in *Conrail.* In any event, the *Granite States* proceeding appears to be one in which the safety-related measures involved (installation of a derailer, imposing a schedule "window" on the use of tracks by a second railroad) are garden-variety operational matters presumably imposing little cost but obvious safety benefits in the circumstances described in the opinions. In contrast, imposition of special train service and a 10-mph speed limit would be quite costly and yet would not obviously be safer. In the *Conrail* litigation, for example, the ICC concluded that regular train service (because of the cushioning effect of the other cars in the event of an accident) would be safer than special train service, and it may be that a 10-mph speed limit for only one type of train on tracks used by other types of trains could cause, rather than avoid, accidents.

at p. 648, especially when such expenditures inflate shipping costs many times over. The ICC therefore properly defers to the expertise and primary jurisdiction[footnote omitted] of the NRC and DOT both in determining which particular measures are reasonably required to produce the necessary level of safety, and in deciding whether any particular safety measure will likely produce benefits commensurate with its cost and be economical....

"The railroads may indeed seek to prove the reasonableness of additional safety measures, but the burden is on them to show that, for some reason, the presumptively valid DOT/NRC regulations are unsatisfactory or inadequate in their particular circumstances."

Conrail, 646 F.2d at 650.

The holding in *Conrail was* not based on the erroneous argument that Alabama Gulf Coast Railway and RailAmerica made in at least one other pending proceeding before the Board that, when Conrail was decided, the railroad bore the burden of proof in an pre-Staggers Rail Act 'Investigation and Suspension' ('I&S') proceeding.[5] While it is true that the railroad, not the shipper, bore the burden of proof in an I&S proceeding, that was simply not the basis for the DC Circuit's holding in *Conrail* that the railroad bore the burden of proof to demonstrate the necessity for imposing safety-related rules of general applicability on the shippers. Indeed, there is no discussion whatsoever of that point in the *Conrail* opinion. Rather, the Court's holding was premised on the Congressional allocation of authority to promulgate safety-related rules and practices to DOT rather than the ICC (now STB).

Conclusion

As Petitioner CF Industries has argued, and as the Board has acknowledged, "primary jurisdiction, expertise and oversight responsibility in rail safety matters are vested in the Secretary of the Department of Transportation, and delegated to the Administrator ofthe Federal Railroad Administration (FRA) . . . [r]ail safety matters are, thus, primarily a matter for FRA's oversight in the first instance." *Granite State Concrete Co., and Milford-Bennington R.R. Co., v Boston and Me. Corp. and Springfield Terminal Ry Co.*, STB No. 42083, 2003 WL 22121645, at n.5 (Sept. 12, 2003), *aff'd sub nom. Granite States*. There is a strong presumption that safety measures stricter than those imposed by the FRA, including special train service, are unnecessary. *Conrail*, 646 F.2d at 650-51. And that presumption can only be overcome by the railroad(s) proving that (a) the additional safety measures would, indeed, enhance safety, and (b) that the benefits of the additional safety measure would exceed the costs of compliance with that measure.

As an *amicus*, EEI has sought to be heard on the legal issue of concern to it that is raised by the Petition. As a non-party to this proceeding, however, EEI does not

[5] *E.g.*, May 9, 2011 "Response to Motion for Injunctive Relief Under 49 USC §721(b)(4)," in STB Docket No. NOR 42129, *American Chemistry Council, et al. v. Alabama Gulf Coast Railway LLC and RailAmerica, Inc.* at 7-8.

otherwise take a position on the specific circumstances that may be at issue in this proceeding.

Respectfully submitted,

Michael F. McBride

Michael F. McBride

Attorney for Edison Electric Institute

cc: Patrick Groomes, Esq.
Louis Gitomer, Esq.